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Office Supreme Court, U.S.
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JUN 6 1961
JAMES R. BROWNING, Clerk

No. 976

In the Supreme Court of the United States

OCTOBER TERM, 1960

MULFRED S. GATLIN, TALMADGE R. GATLIN AND J. SHELBY GATLIN, D/B/A GATLIN LUMBER COMPANY, PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court is reported at 179 F. Supp. 260. The opinion of the court of appeals (Pet. App. III, pp. 30–38) is reported at 287 F. 2d 76, 80.

JURISDICTION

The judgment of the court of appeals was entered February 15, 1961 (Pet. App. III, pp. 38–39), and the order denying a petition for rehearing was entered April 4, 1961. The petition for a writ of certiorari was filed May 17, 1961. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below erred in finding that three specified employees of petitioners were engaged in "forestry or lumbering operations" for purposes of determining the applicability of the exemption provision of Section 13(a)(15) of the Fair Labor Standards Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201, *et seq.* Section 13(a)(15) of that Act provides:

> EXEMPTIONS
>
> (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (15) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed twelve.

STATEMENT

The Secretary of Labor brought this action to restrain petitioners, operators of a lumber company, from continuing to violate the Fair Labor Standards Act. The defendants alleged compliance with the Act, except as to their logging employees who, they claimed, were exempt under the special provisions of Section 13(a)(15), *supra*, p. 2.

The district court found that the defendants had violated the minimum wage, overtime, and record-keeping provisions of the Act with respect to several classes of employees, including the loggers (R. 289–291).[1] It rejected the claim of exemption for the loggers on the ground that, in almost 50 of the 52 pay periods in question, the defendants had more than twelve employees engaged in certain forestry or lumbering operations coming within the scope of Section 13(a)(15) and were therefore disqualified from the exemption by the express terms of the section (R. 288–289; Pet. App. II, pp. 26–27). This determination was based on the finding that, in addition to the ten or eleven other employees admittedly engaged in work specified in the section, the three employees here in question (Lee, Jones, and Bell) were also similarly engaged (R. 288; Pet. App. II, p. 26). Since the petitioners' violations of the Act "had been persistent and continuous," the trial court concluded that is was "necessary and appropriate for this Court to enjoin these defendants from further violations" (R. 291).

The court of appeals affirmed in all respects, sustaining in particular the findings of the district court as to Lee, Jones, and Bell (Pet. App. III, p. 34). Judge Jones, dissenting in part, disagreed with the findings as to Lee, Jones, and Bell, but agreed that the injunction be affirmed as to petitioners' employees other than the loggers (Pet. App. III, p. 38).

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[1] "R." refers to the two volumes of the transcript of record, copies of which have been filed with the clerk of this Court.

Petitioners seek review only of the concurrent findings of the two courts below as to the duties of Lee, Jones, and Bell (Pet. 3). These findings are based upon uncontradicted testimony, set forth in part in the opinion of the court of appeals (Pet. App. III, pp. 32–33), which shows the following: Lee and Bell supervised the cutting of lumber and pulpwood in the De Soto National Forest, and checked the operations of two sawmills in the forest (R. 31–32, 105). Lee supervised the pulpwood operations in the forest and checked to see that the lumber was cut properly (R. 31–32). Both Bell and Lee kept a check on pulpwood leaving the forest to see that it went to the intended places and that the petitioners were properly credited (R. 105). Jones patrolled the petitioners' timberlands to guard against theft of lumber and against trespassers (R. 30, 82–83, 162–163).

It is not disputed that, if any two of the three employees in question were engaged in duties specified in Section 13(a)(15), then the total number so employed would have exceeded the maximum of twelve in 26 of the 52 pay periods in question, and, if all three were so engaged, then the maximum would have been exceeded in 48 of the 52 pay periods (R. 288).

ARGUMENT

The decision in this case is correct and admittedly does not conflict with the decision of any other court; it relates to a particular situation, it is unlikely to affect any substantial number of employers or employees, and it is not, we believe, of sufficient general significance to warrant review by this Court.

The decision below not only accords with the plain language of the statute, but, as the court of appeals noted (Pet. App. III, p. 34), it represents an *a fortiori* application of the ruling in *Woods Lumber Co.* v. *Tobin*, 199 F. 2d 455 (C.A. 6), affirming the decision of the district court (unofficially reported at 20 CCH Labor Cases, par. 66, 640, 10 WH Cases 466), where such peripheral operations as barge tending (including cooking) on a barge unloading logs at river ports distant from the forests, were held to be "forestry or lumbering operations" within the meaning of Section 13(a)(15).

Moreover, the holding conforms with the economic rationale of the forestry exemption, which is, as the court of appeals noted,[2] that "such work can be performed only under favorable weather conditions" (Pet. App. III, p. 33). Not only loggers, but checkers and guards who work in the woods, are subject to the economic effects of the vicissitudes of weather.

Finally, the decision below is in accordance with the settled principle that the burden is upon the employer claiming a special exemption under the Act to show that he is "plainly and unmistakably within [its] terms and spirit". *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 498.

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[2] Citing the remarks of Congressman Winstead of Mississippi at 95 Cong. Rec. 11211–11212.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961